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CHARLES ELMORE CR

Supreme Court of the United States

OCTOBER TERM, 1940

HENRY DUBOIS SONS COMPANY, owner of the Dump Scow D 22 and of the Steamtug Ariosa,
Petitioner,
against
A/S IVARANS REDERI, owner of the Motor Vessel Segundo,
Respondent.

No. 860

HENRY DUBOIS SONS COMPANY, owner of the Steamtug Ariosa,
Petitioner,
against
A/S IVARANS REDERI, owner of the Motor Vessel Segundo,
Respondent.

No. 861

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION

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Statement

The facts are briefly stated in the opinion of the Circuit Court of Appeals (R. 194-5), wherein it appears that the collision in the instant cases occurred on the afternoon of December 7, 1938, in the North River, New York Harbor, between the m/v Segundo and the dump scow D 22, which latter was in tow of the petitioner's tug Ariosa. That the Segundo was in fault had been admitted in her pleadings and she had been held solely at fault by the District Court. The Circuit Court of Appeals found that fault on the part of the Ariosa contributed to the collision, because, although

the master of the tug had the Segundo constantly under observation for a period of some four minutes, during which time he was uncertain as to the Segundo's intended maneuvers and during which time the vessels had been drawing together from 3,000 feet to 500 feet apart, he had blown no whistle signal.

The opinion of the Circuit Court of Appeals states (R. 194):

> "The facts were substantially undisputed; the one issue presented is whether the Ariosa delayed her warning signal too long when danger seemed imminent to escape partial responsibility for the collision."

The Court later in its opinion found (R. 197):

> "It seems to us not in accord with these rules that in the busy North River a vessel may watch another approaching in front of her midstream when the latter's course is not at all understood and refrain from sounding a warning signal of any kind until the intervening space has been reduced from 3000 feet to 500. Had the Ariosa given a starboard passing signal, we should have been disposed to think her justified in so doing. But when she failed to do this, relying on the uncertainty of the Segundo's action, it was surely her duty to give the alarm signal at once, and not to delay either one minute or four minutes. We think her delay was fatal."

The appellate Court having decided that the Ariosa's delay in blowing the alarm whistle contributed to the collision, directed that the damages be divided.

The petition filed wholly ignores the one issue set forth in the decision of the Circuit Court of Appeals and also ignores the grounds given in its opinion. Instead, the petitioner seeks to make it appear that some important question of maritime law is presented, as to which the decision of the Circuit Court of Appeals in the instant case is in conflict with a decision of the Circuit Court of Appeals in the Third Circuit.

POINT I

The Ariosa was in fault for not blowing any timely whistle signal.

Article 18, Rule III of the Inland Rules (33 U. S. Code, § 203), as quoted by the Appellate Court, provides:

> "If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, *from any cause,* the vessel so in doubt shall *immediately* signify the same by giving several short and rapid blasts, not less than four, of the steam whistle" (R. 196).

The four or more blasts of the steam whistle are commonly called the alarm signal, referred to in the opinion of the Circuit Court of Appeals.

It is obvious from the testimony of Captain Sorensen of the Ariosa that this rule applied and his testimony is the basis of the decision of the appellate court.

Captain Sorensen testified that at first he thought the Segundo was going up the North River along the Jersey shore (R. 79, f. 236) and then, as she moved out towards the middle of the river sideways or "crabwise" (R. 70, f. 209), he decided that she was working her way out towards the middle of the river before continuing up to her destination; but he had testified previously before the Local Inspectors, when the matter was fresh in his mind (R. 79, f. 237; R. 196):

> "I had no idea what she was trying to do."

Captain Sorensen had also testified before the Local Inspectors (R. 75, f. 223):

> "Q. As you continued down river did you notice any change of position of the steamer? A. Yes, sir.
> Q. What was that? A. The steamer at first was holding straight up the river, almost parallel to my

> tow. Then she seemed to sag out into the middle of the river and stop and sort of drift and the further I kept coming down river, the more she had a tendency to drift towards me. Her bow slowly came down."

At the trial this testimony was read to Captain Sorensen and he was asked (R. 75, ff. 223-4):

> "Q. When you said her bow came slowly down, you meant it was turning, didn't you, with the tide? A. Yes, it was the tide.
> Q. But her bow was turning out? A. Slowly, yes, sir."

Whether the Segundo was turning towards or was moving "crabwise" towards the course of the Ariosa, she was always drawing closer and despite this Captain Sorensen, who did not know what the Segundo intended to do, testified that he ran from 2,500 to 2,600 feet between the time when he first noticed the Segundo and the time when he sounded the alarm whistle, when the vessels were only 400 or 500 feet apart (R. 70, f. 210; R. 75, f. 225; R. 80, f. 238; R. 194).

Captain Sorensen's failure to blow any whistle signal to the Segundo cannot be excused.

On his own story he had no idea what the Segundo intended to do. She was getting closer all the time (R. 79, f. 237), he spent four minutes (R. 160, f. 479) "trying to figure out what whistle" he could blow (R. 79, f. 237) and found that he "could not figure any way to blow a whistle" (R. 80, f. 239).

The function of the alarm signal was fully discussed in *Merritt-Chapman & Scott Corp.* v. *Texas Corp.*, 98 F. (2d) 719, 721 (C. C. A. 2d). In that case the District Court had held the tug Frank A. Furst in fault for blowing an alarm signal, when in the opinion of the District Judge her master should have understood the course of the Newark. Judge Learned Hand stated that the rule meant what it said, and that a danger signal should be blown if the master failed to understand the course and intention of the other vessel *from any cause.*

POINT II

There is no conflict between the decision of the instant case and the decision of the Circuit Court of Appeals for the Third Circuit.

In *The Gwyned,* 91 F. (2d) 112 at page 113, the Circuit Court of Appeals for the Third Circuit, in interpreting Pilot Rule III, stated:

> "We think that rule III applies and is intended to apply only where vessels are in a position of danger in respect to one another, and we so hold."

In the present case the Circuit Court of Appeals for the Second Circuit held that, as the vessels were approaching each other, there was a position of danger in view of the uncertainty of the master of the Ariosa as to the Segundo's intended maneuvers.

In *Ocean S. S. Co.* v. *United States,* 38 F. (2d) 782 (C. C. A. 2d) at page 784, the Court said:

> "It must always be remembered that it is the risk of collision, not the collision itself, that masters must avoid."

To the same effect, see *The Morristown,* 9 F. (2d) 391 (C. C. A. 2d), where Judge Hough said (p. 392):

> "As we pointed out in The Eli B. Conine, 233 F. 987, 147 C. C. A. 661, negligence is usually error of judgment. The Morristown's master saw plainly what turned out to be a situation of danger; he thought there was no danger, so he went ahead. This is negligence."

In *Chester A. Poling* v. *United States,* 55 F. (2d) 921 (C. C. A. 2d), the Court said (p. 922):

> "Neither vessel had blown any signal. The District Court held the Poling Bros. solely at fault for altering

> her course without signal. * * * Instead of reaching an agreement by signals, each navigator attempted to divine the intention of the other. This has so often been held a mutual fault that the citation of authorities seems almost superfluous. * * * The decree of dismissal must be reversed, and a decree entered holding the respondent liable for one-half the libelant's damages."

In the recent case of *The Trim,* 30 Fed. Supp. 283 (D. C. Mass.), Judge Brewster, an experienced admiralty judge, dealing with a similar situation in which one vessel had been guilty of flagrant fault, said in holding the other jointly liable for delaying the danger signal (p. 285):

> "The fact remains, however, that the captain of the Trim was aware of the erratic course the Exeter was following and must have perceived some time before the collision that a dangerous situation was being created by the mismanagement of the Exeter. It was his duty to take steps to avoid it, if he had time and means to do so."

POINT III

The petition should be denied.

Respectfully submitted,

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